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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY

AP
DEPUTY

No. 54218-8-II

IN THE COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

TIMOTHY MORENO, Appellant.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

P/M: 10/21/20

I, Mr. Timothy Moreno, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

My trial attorney was ineffective in assistance of counsel for failing to investigate the State's main witness

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S.A.G. - 1.

Ms. Shannon Smith, who was their Confidential Informant (CI) that the officers testified told them that she was giving Mr. Moreno a ride to score some drugs for them to use. 9/16/2019 pre trial RP21, Sgt. Chris Packard (Thurston County Sheriff) testified she told him, "A few ounces of something - I don't recall if it was meth or heroin - was supposed to be purchased by Mr. Moreno from Mr. Whitehawk." When asked how the informant came by this information, Sgt. Packard testified, "She was driving Mr. Moreno to the Ross Dress For Less." RP21. Ms. Shannon Smith was a very crucial exculpatory witness that the defense attorney should have talked to and called to be a defense witness. The charge that carried the most time was Possession With Intent To Deliver. Ms. Shannon Smith's testimony would of completely been exculpatory to this charge as she told her CI boss that Mr. Moreno was there to get the two of them drugs to get better, not that he intended to sell the drugs he was purchasing. The deal was to help her with her charges or some favor she was working off, and the intended target was Mr. Whitehawk who she said was the drug dealer meeting them there in his Mini-Cooper, not Mr. Moreno who she cared about and was having a relationship with. The defense attorney did not talk to her, if he had, he would of known she would be a very good witness to exonerate Mr. Moreno of drug dealing.

It was axiomatic by the record made by Sgt. Packard that the defense attorney should have talked to informant CS 959, Ms. Shannon Smith, whom had constantly been texting Sgt. Packard. 9/16/2019 pre trial RP49. CI Ms. Shannon Smith described in detail the car that the drug dealer would be in as Sgt. Packard testified to her texting, "A silver Mini Cooper that was parked next to the informant's red Honda." RP24. Had the defense read all of her text messages it would of been manditory to call her and have the Possession With Intent to Deliver charge thrown out and not even make it to the jury. Not considering this evidence and talking to Ms. Shannon Smith can in no way be considered a tactical decision in any way shape or form. It was malfeasance for a defense attorney not to talk to her when Mr. Moreno literally begged his attorney to do so. "Where a counsel's failure to investigate indicates a complete lack of trial preparation, such performance falls below the level of reasonable professional assistance and is thus constitutionally deficient." Kimmelman v. Morrison, 106 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). "Counsel must investigate all reasonable lines of defense." Kimmelman v. Morrison, 477 U.S. at 384. "Failure to interview witnesses is deficient performance." Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 2466, 162 L.Ed.2d 360 (2005). "The

deference generally granted to strategic choices of counsel is not justified when lack of adequate preparation is at issue." Young v. Riverland, 29 F.3d 638 (9th Cir. 1994). "Accordingly, no deference is required to tactical decisions made by counsel where counsel fails to conduct appropriate investigations prior to making the tactical decision." Rios v. Rocha, 299 F.3d 796, 805-11 (9th Cir. 2002). Counsel's "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." Wiggins v. Smith, 539 U.S. 510, 526, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). "A criminal defendant has a state and federal constitutional right to effective assistance of counsel... To discharge this duty, trial counsel must investigate the case, and investigation includes witness interviews." State v. Jones, 183 Wn.2d 327, 352 P.3d 776 (2015). "A criminal defense attorney does not satisfy the standard of reasonably competent performance by accepting the truth of statements made by critical eyewitnesses to the police and later failing to contact and interview them." State v. Visitacion, 55 Wn.App. 166, 776 P.2d 986 (1989). "Counsel's failure to interview a clearly identified, potentially favorable witness constituted deficient performance." Cannedy v. Adams, 706 F.3d 1148, 1161-62 (9th Cir. 2013). Evidence does show that Ms. Shannon Smith would have been exculpatory,

Additional Ground 2

It was prosecutor misconduct the way the State explained to the jury their duty to convict on Possession With Intent to Deliver because accomplice liability made it automatic. "You've got Mr. Castilla-Whitehawk saying, well, it wasn't really me that was there to deliver the drugs. I was just there to buy it from someone." RP664. The State further convoluted the jury instructions by telling the jury, "But one is the supplier to the other. I don't have to prove which one supplied the other, but know at the quantities they're dealing with, the other one was gonna go distribute it to someone else, whether it was a street user or another dealer. I'll come back and talk a little more about that, but that's how this fits into this accomplice concept." RP605. Fair trial got thrown right out the window on this catch all instruction and explanation when the State continued, "Possessed heroin and the other was an accomplice, if one of them possessed it and they were an accomplice to the other, it does not matter who possessed it." RP606-607. This completely shifted the burden of proving intent to deliver and granted a blanket guilty with out any due process ignoring the elements required to convict being met. "A prosecutor commits misconduct by

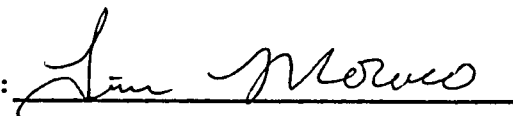
trivializing the burden of proof and the reasonable doubt standard." State v. Johnson, 158 Wn.App. 677, 684, 243 P.3d 936 (2010). "A prosecutor commits misconduct by misstating the law or making arguments inconsistent with the Court's instructions." State v. Davenport, 100 Wn.2d 757, 760-62, 675 P.2d 1213 (1984). "Prejudice exists where there is a substantial likelihood that the misconduct affected the verdict." State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). It is crystal clear that the State told the jury that all they needed to convict was accomplice liability, yet no evidence what-so-ever was raised that Mr. Moreno intended to do anything other than what Ms. Shannon Smith told her handler, that he intended to do the drugs and get them both high. The prosecutor shifted the guilt and the burden of proof required by telling the jury Mr. Moreno was guilty just because there was a large quantity of drugs. In reality, an ounce is about one weeks usage to a heavy user as Mr. Moreno was at the time. Two ounces underneath the seat were attributed to him by the police, the large quantity on Mr. Whitehawk and in the trunk of Mr. Whitehawk's car should not be attributed to Mr. Moreno who had no access, prior access, or knowledge of. The State used this bad instruction to convict and denied due process.

Additional Ground 3

It was clear prosecutor misconduct when the State disparaged my attorneys and pretty much told the jury that the defense lawyer lied to them by making up stories. "You notice that both defense attorneys told you stories. They didn't talk about the facts." RP675. "It is improper to disparage defense counsel." United States v. Ford, 618 F.Supp.2d 368 (2009). "A prosecutor should refrain from personally attacking defense counsel, impugning the character of the defendant's lawyer or disparaging defense lawyers in general as a means of imputing guilt to the defendant." State v. Fisher, 165 Wn.2d 727, 202 P.3d 937, 959 (2009). "It is improper for a prosecutor to disparage defense counsel's role or impugn counsel's integrity." State v. Thorgerson, 172 Wn.2d 438, 451, 258 P.3d 43 (2011).

DATED: October 19, 2020

SIGNED:



Mr. Timothy Moreno